

LECTURES  
ON  
THE JUDICATURE ACT,

DELIVERED BY  
D. B. READ, ESQ., Q.C.,

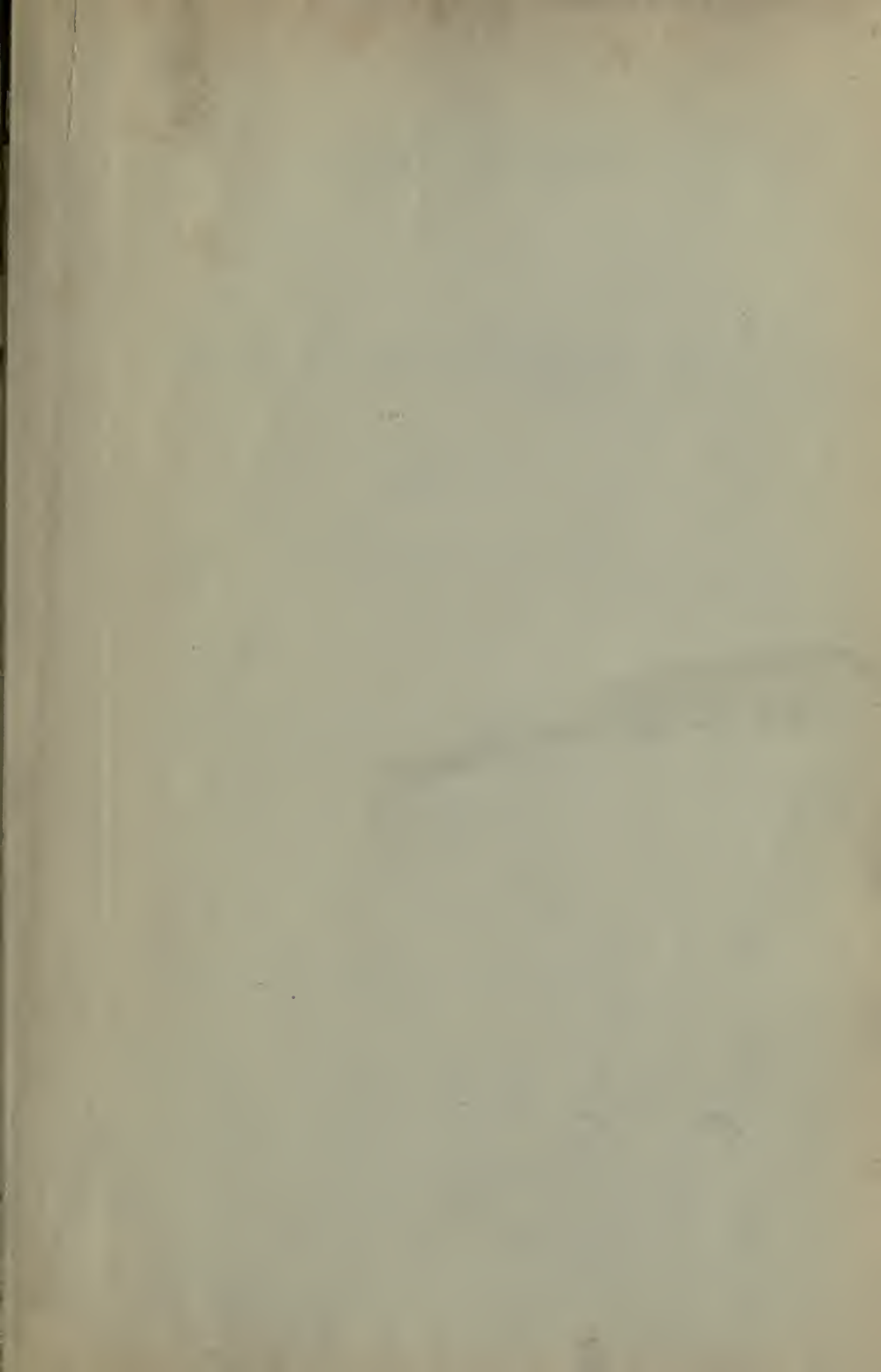
TO THE  
LAW STUDENTS, IN THE WEEK BEFORE THE  
LONG VACATION, A.D. 1881.

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TORONTO :  
ROWSELL & HUTCHISON,  
1881.

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## ERRATA.

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For "*triâ juncta in reno*," in Lecture I., read "*tria juncta in uno*."

Page 39. Order VIII. Rule 16—For "If notice admitted, plaintiff may proceed as in case of no appearance," read "If notice *omitted*, plaintiff may proceed as in case of no appearance."

Page 37. Order VII.—For "Time for service out of Ontario," read "Rule II. Time for defending on service out of Ontario."

Page 40, line 8—For "Order VII. trials of," read "Order VII. treats of."



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*David Breckenridge*  
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## INTRODUCTION.

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### TO THE STUDENTS :

Since the delivery of these lectures I have been requested by both students and barristers to permit them to be published. I yielded to the request in the hope that they may be of some slight service in unravelling the entanglements of the Act. They were intended but as a glossary. The students will no doubt go to the able writers on the Act for the complete information which it is not within the compass of lectures to afford. The lectures were not written when delivered. The students who attended will remember that the Act was expounded from notes made on the various sections. Since their delivery I have written out the lectures so as to present them to the students who were not able to attend, endeavouring as far as possible to keep up the form in which they were delivered. I have given a digest of the *orders*, wishing to convey their meaning in as few words as possible, rejecting unnecessary verbiage with a view of getting at their real meaning. If the students derive profit from their perusal, it will be a satisfaction to their friend and well wisher.

D. B. READ,

OSGOODE HALL.



## LECTURE I.

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### THE CONSTITUTION AND OFFICERS OF THE COURT.

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The Courts existing at the time the Act takes effect, are not abolished: but are consolidated into one Court, into one Supreme Court of Judicature for Ontario. The Courts so consolidated are the Court of Appeal for Ontario, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery. The Supreme Court thus formed, is again sub-divided into *two* divisions, viz., (1) "The High Court of Justice for Ontario;" (2) "The Court of Appeals for Ontario." The High Court of Justice is again sub-divided into three divisions, which will be called "The Queen's Bench Division of the High Court;" "the Common Pleas Division of the High Court," and the Chancery Division of the High Court." It will thus be seen that although the Court of Appeal is a part of the Supreme Court, it is no part of the High Court of Justice; it will also be seen that the several Divisional Courts referred to are part and parcel of the High Court of Justice, but not of the Court of Appeals, they are in fact "*tria juncta in uno*," three Divisions of one High Court of Justice. It is important to bear these distinctions in mind, as the whole basis of the

Act is to have all cases, whether of law or equity, originally disposed of in one Court—the High Court of Justice—it matters not in what Division of that Court a case may be entered, it is still in the High Court. A case founded on equitable principles may be entered in the Queen's Bench or Common Pleas Division, just as well as in the Chancery Division; so a case founded on Common Law principles, may be entered in the "Chancery Division," or in either one of the other Divisions as the plaintiff's solicitor may choose. A plaintiff may commence proceedings in the Queen's Bench Division, and find himself summarily, by Judge's order, landed in the Common Pleas Division or the Chancery Division, and so *vice versa*, he may commence in the Chancery Division, and subsequently, by order of a Judge, find himself in the Queen's Bench or Common Pleas Division. This is all consistent with the spirit of the Act, which is to have justice administered by the High Court of Justice, it matters not by what Division of that Court, or whether the initiative be taken in one Division, pursued in another Division, and the *wind up* of the case in a third Division. The Judges presiding in those Divisions, are all Judges of one Court, and are bound to administer both law and equity, whether the proceedings are being conducted in one or other of the Divisions. The 5th sub-section of section 3 expressly provides, "that save as in the Act, is otherwise expressly provided, all the Judges therein before mentioned, and their successors shall have in all respects equal power, authority, and jurisdiction. The Chief Justices of the several Divisions of the High Court are to bear the same respective titles that they bore before the Act came into force. It is true, the Act declares that the Chief Justice of the Queen's Bench, shall be the President of the Queen's Bench Division; the Chancellor shall be the President of the Chancery Division, and the Chief Justice of the Common Pleas, shall be the President of the Common Pleas Division. By this, I would not have the students understand that the Act intended to take away from the Chief Justices their good name, or that it was

intended to convert a Chief Justice into a President. All that could have been intended was to make assurance doubly sure, and to specifically enact that the head of a Division of the High Court should be the presiding Judge of the Division, while maintaining his title of Chief Justice as he had been accustomed. I express this to you as my own view of the Act, at the same time calling your attention to an incongruity it is difficult to understand. The writs of summons, as you will see by referring to Appendix A, No. 1 of the Act, are apparently to be tested in the name of President. The words at the end of the form are, "Witness, the Honourable ———"

"President," &c.

Section 5 of the Act prescribes the oath to be taken by the Judges, and says: "The oath is to be administered to the Chief Justices and the Chancellor by the Lieutenant-Governor in Council, and to the Justices of the High Court other than the Chief Justice, in presence of the President of the High Court." The student will thus perceive that in the same clause the head of the Court is called Chief Justice and President; and the attestation clause of writ calls him "President." I am not willing to believe that the time-honoured name of Chief Justice is to be superseded in a Court of Justice with the name of President. The latter is a very honourable name as applied to a State, or a number of States, but does not seem applicable or so used even in democratic States as applied to the head of a Court. I prefer to give effect to the 4th sub-section of section 3, and accord to the Chief Justices their ancient title. This is a matter, however, which concerns the dignity of the Court, rather than the matters I intended to bring to your notice in these lectures. *En passant* I think it right, however, to bring the subject to your notice; as also that the Judges of these Divisions are not to be called hereafter "Puisne Judges," but "Justices of the High Court." The old "once a Puisne always a Puisne" doctrine more honoured in the breach than the observance in this land, will have lost its charm when the Judicature Act comes into full

play—the signification may be the same, but the name “Puisne Judge” has received its quietus just as much as the name “John Doe” or “Richard Roe,” of sacred memory, did years ago.

I cannot too strongly impress upon the students the fact of the several Divisions of the High Court making but one Court, as also the distinctive character of the Court of Appeal as in treating of the officers of the Court to which I shall presently come, as well on account of the jurisdiction to which I have referred, it tends to simplify the scheme of the Act. The Court of Appeal, as I have said, is a part of the Supreme Court, but not of the High Court—it remains as at present existing “the Court of Appeal of Ontario.”

The Justices of the High Court are to be *ex officio* Judges of the Court of Appeal, with the same duties and powers as by the Court of Appeal Act, Revised Statutes of Ontario, cap. 38, sec. 10, is provided with respect to the Judges of the Court of Queen’s Bench, Chancery, and Common Pleas. The Judges of any of the Courts consolidated into the Supreme Court, are to be liable to any duty, and shall have all the authority and power which the Judges of the Courts consolidated have had, *not incident* to the *administration of justice*, but conferred by *any Statute law* upon any Judge of the Court so consolidated.

#### OFFICES AND OFFICERS.

All officers of the Divisions of the High Court who, at the commencement of the Act, shall be attached to the several Divisions of the *High Court* are to remain so attached—this is, however, subject to the order of the Lieutenant-Governor in Council, and to the power of the Judges of the Supreme Court who may change the official names of offices and officers, and regulate the duties of officers. This provision as to offices and officers being attached to the respective Divisions of the High Court, is not to apply to *three* officers, viz. :

1. Master in Ordinary.
2. Local Masters.
3. Taxing Officers.

These three last named officers are to be officers of the Supreme Court, and attached thereto—it follows that being officers of the Supreme Court, they are liable to perform duties appertaining to the Court of Appeal, as well as duties belonging to the High Court. All officers are to be auxiliary to one another for promoting the correct, convenient, and speedy administration of justice: from this the students will see that there need be no delays from press of business. Each officer in any Division is subject to be called upon by an officer of any other Division to give a helping hand when emergency demands. There is constituted a new officer to be called “The Master in Chambers”—this officer, though new in name, is a kind of *double first*—he combines in himself the power, authority, and jurisdiction heretofore possessed by the “Clerk of the Crown and Pleas,” and “Referee in Chambers of the Court of Chancery.”—hence he is the officer in whom students most delight—he is the officer in fact before whom they will exercise their learning in practice: it makes no matter whether it be a matter of practice in law or equity, the Master in Chambers is the officer to whom the student will go to unravel difficulties and intricacies, to help to cure mistakes and correct errors. Even students will sometimes make mistakes, and it is well to have a skilful master to cure his ills. It is necessary to bear in mind that this officer is subject to the same exceptions as to his powers as were excepted by the Common Law Rules of Trinity Term, 1870, and in regard to the Referee in Chancery by 560 of the Orders of the Court of Chancery. Any official Referee may, at the request of the Master in Chambers, sit for the Master in Chambers. As by the Act, the Master in Chancery, the Clerk of the Crown and Pleas, the Referee in Chambers, the Accountant, the Inspector of Titles, the Referee of Titles, and the Local Masters of the Court of Chancery, are made Official Referees for the trial

of such questions as shall be directed to be tried by such Official Referees, they are liable to be called upon to sit for the Master in Chambers.

It is rumoured that the Government intend to appoint the gentleman who has been Referee in Chambers of the Court of Chancery before the passing of the Judicature Act, Clerk of the Crown and Pleas, making it a part of his duty, on request of the Master in Chambers, to sit with or for such Master.

It will be a relief to the Students to know that two of the officers of the "High Court," in *addition* to their other duties, are to be Judgment Clerks of the "High Court," for the purpose of settling the forms and terms of such Special judgments as may be referred to them for that purpose by any Divisional Court, or a Judge of any Division, or by the Master in Chambers. When it is considered that the High Court entertains suits between almost any number of plaintiffs and any number of defendants, that they in the same suit adjudge matters not only between plaintiff and defendant, but between defendant who in his turn becomes *quasi* plaintiff against third persons made defendants, and all kinds of claims and counter claims, law and equity in the same action, it would seem necessary that there should be officers to settle the forms and terms of judgments, or otherwise inextricable confusion might ensue. Under the Act the Deputy Clerk of the Crown and the Deputy Registrar may or may not be the same person. When they are *not* the same person the Deputy Clerk of the Crown in actions in the Queen's Bench and Common Pleas Divisions are to have the powers of the Deputy Registrar (*not* Local Master) and the Deputy Registrar in actions in the Chancery Division is to have the powers and duties of the Deputy Clerk of the Crown, in addition to the duties and powers of Registrar. When the office of "Deputy Clerk of the Crown" and "Deputy Registrar" are *united in the same* person he shall be styled the "Local Registrar of the High Court," and every reference in the orders to the said two officers, or either of them, when so united, shall be held to

apply to the "Local Registrar." When action is commenced in the office of the Deputy Registrar or Deputy Clerk of the Crown, all orders that require to be entered (except orders made by the County Court Judge or the Local Master of the County, under the authority and jurisdiction vested in them by the Rules of the Act) shall be entered at Toronto, and when necessary office copies so entered shall be transmitted or delivered to the Deputy Clerk of the Crown, Deputy Registrar, or Local Registrar to be filed with the proceedings in the action.

By the 8th rule of Order 49, there has been an attempt made to decentralize business of the Courts, so that business which used to be done in Toronto, may be done in the cities outside of Toronto and rural counties. The attempt, however, is more in the conception than in the performance. Under the Rule (eight) referred to, the County Court Judge of the County in which an action is brought from and after 1st January, 1882, shall have all the powers or authority of "Master in Chambers," except that the authority of the County Court Judge shall not extend to *granting leave for service out of Ontario*, of writ of summons, or notice of writ of summons. In counties where there is a Local Master, such Local Master is given the powers of Master in Chambers in regard to causes and actions brought in his County in the Chancery Division. and in such counties the County Court Judge shall have and exercise the said jurisdiction, power, and authority *only* in regard to causes and actions in the county in the Queen's Bench and Common Pleas Divisions. By Rule 8, (a) the power and authority of County Court Judge under Rule 8, is not to apply to an action in which the writ is issued in the County of York, or to any action where the solicitors of *all* parties do not reside, or have not offices in the county town of the county in which the action is brought, or wherein any party who has no solicitor, does not reside or has not a place of business in the county or union of counties; but the County Court Judge may make *Ex parte* orders though the solicitors of all parties do not

reside in the county town of the county where the action is brought. When it is considered how many actions will be brought in which necessarily the different parties defendant will reside in different counties; when it is considered that in equity cases the parties defendant are in very many cases in different counties; when it is considered that the whole scope of the Act, is to determine all questions arising out of the same subject matter, whether between the plaintiff and defendant, or between the plaintiff and defendant and third parties liable over to the defendant, when it is considered that the Act admits of addition, subtraction, and division of defendants, as well as of plaintiffs, it is to be apprehended that there is more of decentralization in form than in reality in the Act. As I have referred to Rule 8 of Order 49, I think I had better refer you shortly to Rules 10, 11, 12, and 13, the substance of which Rules is, (1) that except as to moneys paid into Court in satisfaction of the whole or part of a claim, it requires the order of the Court (Divisional) for the payment out of Court, or distribution of moneys paid into Court; (2) That the County Court Judge, Master in Chambers, or Local Master, may refer matters he thinks proper to be so referred, to the decision of the High Court Judge; (3) That an appeal lies from any County Court Judge or Local Master to Judge of the High Court, though such order was made by consent; (4) That the appeal is to be by motion or notice served within four days after decision, and the motion to be made within eight days after decision; (5) That the appeal is to be no stay of proceedings unless otherwise ordered by a Judge of the High Court, or Judge or officer whose decision is complained of.

The 76th clause of the Statute, is an important one, more perhaps in the estimation of County Court Judges than others, as by that clause the Judges of the County Courts are declared to be Judges of the High Court for the purposes of their jurisdiction in actions in the High Court, and in the exercise of such jurisdiction may be styled "Local Judges of the High Court," and in actions

in the High Court, have all the powers and authority that the Judge of the County Court had at the passing of the Act in actions in the Queen's Bench and Common Pleas, County Courts and Division Courts as to matters in their jurisdiction, are placed on the same footing as to proceedings, relief, redress, remedy, and combination of remedies as the High Court of Justice. Counter claims in County and Division Courts beyond the competence of such Courts, will not affect the jurisdiction to dispose of the whole matter in controversy, but no relief exceeding that which the Court has the jurisdiction to administer, shall be given the defendant on such counter claim; and the High Court or any Judge thereof may, on application, order that the whole proceeding be removed from the County or Division Court to the High Court.

The Act provides that there is to be a "Local Master" in every County or union of Counties other than the County of York. The Local Master is to reside in the County in which he is appointed. In the event of there being no Local Master at the commencement of the Act, or where a vacancy occurs in the office of Local Master, the Judge of the County Court is to be the Local Master. If there is a Senior and Junior Judge, the Senior Judge is to be the Local Master. If the County Court Judge should be the Local Master, then the County Court Clerk will be the Deputy Registrar. As vacancies occur the office of Deputy Clerk of the Crown and Deputy Registrar (*not* Local Master) are to be consolidated. As I before remarked, the Master in Chancery, the Clerk of the Crown and Pleas, the Referee in Chambers, the Accountant, and the Inspector of Titles, the Referee of Titles, the Local Master of the Court of Chancery shall be Referees (*official* referees) for the trial of such questions as shall be directed to be *tried* by such Referee. The above named officers, as well as any other officers of the Courts of Law or Equity, shall respectively have (under the names they have heretofore had or any name which under the Act may be given to them) the same judicial or other

powers in respect of business in each and every of the Divisions of the High Court, as they now have in respect of the business of the Court to which they are attached, their orders or decisions to be subject to appeal as heretofore. There shall be an official "Guardian *ad litem*" of Infants. The official Guardian besides acting as "Guardian *ad litem*" is to perform such other duties as the Divisional Court or Judge may decide. If new official "Guardian *ad litem*" appointed, he "*ipso facto*" becomes "Guardian *ad litem*" to all infants in the place and stead of his predecessor, with the same duties and powers. The change of officers is more in name than in reality. The addition of "The Master in Chambers" is the only important change. The Student acquainted with the practice in Equity may go on in the even tenor of his way: he will not find the changes so great as the appearances might indicate. I have no doubt whatever that when the machinery under the new system gets in working order the fancied difficulties will rapidly disappear. In my next lecture I propose to take up the subject of "Jurisdiction," "Sittings and distribution of business," "Appeals," and that part of the Act under the head of "Rules of law." The last named subject as well as a good deal already commented upon may be more proper for the Barrister than the Student; but as I suppose some of those present will soon be numbered with the Junior Bar, I have thought it right, as far as my limited time will allow, to go over the whole Act; not as a book writer but in such manner as to open the door for further enquiry: in the hope that I may so pave the way as to enable you the more easily to comprehend the different provisions of the Act.

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## LECTURE II.

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### JURISDICTION.

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The Act provides that all the jurisdiction and powers possessed by the Court of Chancery, the Queen's Bench, the Common Pleas, and Court of Assize, Oyer and Terminer and Gaol Delivery at the commencement of the Act (whether created by commission or otherwise) should be vested in the High Court of Justice, and that the High Court should be deemed to be and should be a continuation of the said Courts respectively, under the name of the High Court of Justice: *also* the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by any of the Judges of said Courts: *also* all the ministerial powers, duties, and authorities incident to any and every part of the jurisdiction. So far as relates to the Criminal Court of "Oyer and Terminer and Goal Delivery" this legislation makes this Criminal Court a part of the High Court of Justice, or rather affects to give to the High Court of Justice all the jurisdiction and power possessed by the Court of Oyer and Terminer. Now, assuming that nothing more is intended by this than the creation of a new Criminal Court, or the continuation of an established Criminal Court, and so coming within the exclusive powers conferred on Local Legislatures by the 92nd Sec. of the British North American Act, which among others gives power to such Local Legislatures to make laws for "The administration of Justice in the

Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction," the question arises, can any of the Judges of the former Court of Chancery who have not been invested with power to execute matters of Criminal Law, under this legislation exercise Criminal Law powers without Commission from higher authority than the Local Legislature of Ontario? It is very certain the Equity Judges will not enter on the exercise of such power unless they can feel they are on sure ground. The responsibility is great. It is argued by some that the Local Legislature, by this legislation, have gone further than the British North American Act warrants; that indeed they have trespassed on the exclusive powers of the Dominion Parliament, as contained in the 91st Sec. of that Act, giving exclusive power to the Dominion Parliament to make laws, as to "The Criminal law, except the constitution of courts of criminal jurisdiction, but *including the procedure* in criminal matters. It is not for us to decide this matter; this Act has been passed by the Local Legislature, and not disallowed: not being so disallowed, either in whole or part, I presume it is intended that it shall go into force as to all civil matters at any rate, and that as to criminal matters the Common Law Judges who have had jurisdiction over criminal matters will still continue to exercise such jurisdiction, or the Equity Judges in another manner be invested with power over criminal procedure. I have to allude to this matter as some have expressed a doubt whether the Judicature Act would be allowed to have effect. However, as books have been written on it, I think lecturing on its provisions may be excused: especially as one should be prepared for any contingency. In answer to a question put to me by one of the students as to what becomes of pending business under this Act, I say that pending business when judgment *has not* been fully given or entered is to be continued in the name of the *old Court*, but that as to Decrees, Judgments, Rules and Orders of any Court, whose jurisdiction is vested

in the High Court, which had been duly perfected in the old Court, they are to be continued in and concluded before the High Court of Justice.

#### SITTINGS AND DISTRIBUTION OF BUSINESS.

1. Terms for Administration of Justice business are abolished, but under law as now existing, may continue to be referred to as a measure for determining the time at or within which any act is required to be done.

2. The High Court and Court of Appeal, and Judges thereof, shall have power to sit at *any time*, and at *any place*, for the transaction of any business or duty.

3. The Lieutenant-Governor in Council may, upon report of Council of Judges of Supreme Court, regulate the vacations to be observed by the High Court and Court of Appeal.

4. All causes and matters in the High Court of Justice shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be directed by rules or orders of Court.

5. Documents commencing actions are to be marked with the name of the Division in which the action is commenced.

6. All Interlocutory and other steps in a cause after the commencement, are to be taken in the Divisions to which such matter is *for the time being* attached.

7. Any cause or matter may, at any time, or at any stage, be transferred from one Division or Judge of the High Court to any other Division or Judge in such manner as rules of Court may provide, or as transfers might have been made from one Court to another before the passing of the Judicature Act.

8. As far as practicable a single Judge shall dispose of actions and proceedings in the High Court.

9. Two or three Judges of High Court, and no more, to constitute a Divisional Court.

10. It shall be the duty of every Judge of the High Court, if required so to do, to take part in the sittings of such Divisional Court as may from time to time be deemed necessary for the transaction of any of the business of the High Court.

In stating these ten rules applicable to the sittings and distribution of business, I have endeavored to give the gist of the Act on this subject in a short and succinct manner, stripped of the verbiage in the Act itself. The abolition of Terms will tend to speed a cause—justice will be more speedily attainable. The power given to the High Court and Court of Appeal to sit at any time or place, is an important alteration of the former law. Whether the Courts will be migratory or fixed, will depend on the Judges themselves. So far as the enactment goes, there seems to be no reason why part of a cause may not be tried in Toronto, and another part in any County Town, or divided into parts in any County Town or place in the Province, and at such times as the Judges shall fix. The Rules of Court have not yet been made to carry out the Act. I presume the Judges will regulate this matter by rule as best to carry out the spirit of the Act. You will not fail to observe the rule as to distribution of business among the several Divisions of the High Court, as also the provision as to transferring any cause or matter at any time or stage to another Division. These provisions of the Act will prevent any clog in business. The Judges, I should say, will be pretty continually employed—the shifting scenes presented to them will add variety, which some think is a charm in work.

#### APPEALS.

1. Orders made by consent, or as to costs only, which are by law left to the discretion of the Court, are not subject to appeal.

2. No appeal allowed to Divisional Court from an interlocutory order if before the passing of the Act there would

have been no relief from a like order to a Superior Court; in like manner there shall be no appeal to the Court of Appeal from interlocutory orders.

3. No appeal lies from judgment or order of Divisional Court or Judge of the High Court to Court of Appeal, without special leave of Judge or Divisional Court, whose judgment or order is in question, or of the Court of Appeal *unless* the matter in controversy on the appeal exceeds the sum or value of \$200, exclusive of costs; and in cases where there has been no difference of opinion among the Judges of the Divisional Court as to any order of such Court, unless the matter in controversy on the appeal exceeds the sum or value of \$300.

4. No leave to appeal necessary where the title to real estate or some interest therein, or the validity of a patent is effected, or where the matter in question relates to the taking of an annual or other rent, customary or other duty, or fee, or a like demand of a general or public nature affecting future rights.

5. No appeal lies where on a motion to set aside or discharge a rule, order, or decision of a Judge, the order of the Divisional Court does not substantially vary the rule, order, or decision moved against.

6. Save in cases (I have mentioned as not being subject to appeal) every rule, order, or decision made by a Judge of the High Court in Chambers, except orders made in the exercise of such discretion as by law belonged to him, may be set aside or discharged upon notice by any Divisional Court. And no appeal shall lie to the Court of Appeal from any such rule, order, or decision, unless by special leave of the Judge, by whom the same was made, or of the Divisional Court, or of the Court of Appeal.

7. Save as aforesaid any rule, order, or decision of a Judge in Court may be appealed against to the Court of Appeal.

8. No appeal to the Court of Appeal allowed, unless notice thereof is given in writing to the opposite party, and to the Clerk of the Crown and Pleas, or Registrar of

the proper Court within one month after the judgment complained of, or such further time as the Court appealed from, or a Judge thereof may allow proper security for the appeal to be given within three months after judgment, or such further time as the Court or Judge may allow.

9. Single Judges of Court of Appeal may decide all interlocutory matters in any case or matter pending in that Court.

10. The Court of Appeals may sit in two Divisions at the same time, if the Lieutenant-Governor in Council, or a majority of the Judges of the Supreme Court deems it expedient. The majority of Judges of the Supreme Court to select as many Judges of the High Court as may be necessary, together with the ordinary Judges of the Court of Appeals to form the two Divisions.

## TRIALS AND PROCEDURE.

1. At the trial of an action no party is entitled to judgment on the ground that his pleading is true if the facts proved are not sufficient in point of law to entitle him to judgement.

2. In causes and matters which at the time of the passing of the Act are within the jurisdiction of the Courts of law, the *mode* of trial shall be the same as now provided by law for like cases in the Courts of Queen's Bench and Common Pleas.

3. In causes and matters over which the Court of Chancery has at the time of the passing of the Act *exclusive* jurisdiction, the mode of trial shall be according to the present practice of the Court of Chancery.

4. Subject to rules of court and to such right as may exist, to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter, (other than criminal proceedings by the crown) before the High Court of Justice OR before the Court of Appeal, may be referred by the Court or any Divisional Court or Judge

before whom such cause may be pending for inquiry, and report to a Judge of County Court or Official Referee.

5. The High Court or any Divisional Court or Judge or Court of Appeals may call in the aid of an *assessor*, specially qualified and *try* and *hear* such cause or matter wholly or partially with the assistance of such assessor.

6. In any cause or matter before the High Court when *all* parties are under no disability the High Court or Judge thereof may without consent of parties in any cause or matter requiring any prolonged examination of *documents* or *accounts* or any *scientific* or *local* investigation, order any question or issue of fact or any question of account arising in the cause or matter to be *tried*, either before County Court Judge, or Official Referee or Special Referee; in other cases the consent of the parties must be obtained.

7. In all cases of trial before Referees, the Referees to be deemed officers of the Court and to have such authority as perscribed by Rules of Court, or Court or Judge ordering the Reference, and the report of Referee to be equivalent to the verdict of a jury (unless report set aside by the Court.)

8. With respect to all such proceedings before the Referees and their reports, the Court or Judge shall have the same or the like powers as by the Common Law Procedure Act and other Acts are given to any Court whose jurisdiction is by the Judicature Act, vested in the High Court, with respect to references to arbitration and proceedings before arbitrators and their awards and appeals.

9. All the forms and procedure in force where not inconsistent with the Act or rules of Court to remain in force.

There is nothing in the rules relating to appeals that call for any observations, except it be to call your attention to the rule, which states that orders as to costs *only*, which are by law left to the discretion of the Court, are not subject to appeal. There is force in the word *only* in this order, as if the order be for something else than costs *only*, the order may be appealed against.

As to the rules, however, which apply to trials and pro-

cedure, I have divided the subject into nine parts or rules I put by way of rule what is in the body of the statute clause enactments. I will refer to my numbering *seriatim* in the comments I propose to make on the subject: 1st. then attention to Rule 1 will shew you that the Common Law practice of having the facts as set forth in the pleadings at a trial found and pronounced upon, leaving the questions of law to be afterwards determined in Term, is virtually abolished, with just as much effect as Terms themselves are abolished. The old Chancery practice supersedes the Common Law practice, and for the future the result of the cause will not depend on the finding the facts set forth in the pleadings to be true; but the Judge at the trial or hearing, will give judgment for the party entitled in point of law or equity, although in doing so, the facts as set forth in the pleadings, have not been found to be true. There will in future be no more motions "in *arrest of judgment*," or "*non obstante veredicto*," which your reading will have shewn you, were applicable to cases where a party got a verdict on proof of the facts in his pleadings, the law at the same time being against him. In such case he would in Term get rid of the verdict by moving the Court to *arrest the judgment*, or for judgment "*non obstante veredicto*."

The 2nd rule refers to the modes of trial in causes or matters which at the time of the passing of the Act, were within the jurisdiction of the Courts of Law. In these cases, the trial will be by Judge or jury, as was the case in the Queen's Bench or Common Pleas before the passing of the Act. To illustrate this: Suppose the action to be one of libel, slander, criminal conversation, seduction, malicious prosecution, and false imprisonment. All these causes of action by the 252nd section of the Common Law Procedure Act, Rev. Stat. Ont. ch. 50, *had to be tried by a jury*, unless the parties waived the trial by jury. This class of cases will still have to be tried by jury. So at law, equitable issues had to be tried by a Judge and *not* by a jury; this will still remain the same. There were other cases in the

Queen's Bench and Common Pleas which might be tried by either mode, Judge or jury; the intention of the Act is to preserve the same mode of trial as existed at the time of the passing of the Act. Rule 3 explains itself, and needs but little if any comment. The Court of Chancery had exclusive jurisdiction before the passing of the Act in all equitable claims, except equitable money demands. The Common Law Courts could entertain equitable suits for *money* demands only. The exclusive jurisdiction which the Court of Chancery possessed before the Act, it will still retain. The 4th Rule is a new departure. By that Rule (subject to the right to have particular *cases* submitted to a jury, such as I have referred to in my remarks on Rule 2, and the illustrations given there and to Criminal proceedings by the Crown,) not only the High Court of Justice, or any Division of the High Court of Justice, but the Court of Appeal may refer any *question* arising in any cause or matter before such court to a Judge of the County Court, or to an Official Referee, or to any other person agreed on by the parties to report upon the *question*.

It is in fact (for the reference may be to any County Court Judge) converting a County Court Judge, Official Referee, or other person agreed upon into a kind of Master's office. References to Master to report have always been adopted in Chancery, now the same references may be made to the officers named in either Common Law or Equity matters, and is extended to the Court of Appeal. The report is not final, but may be adopted in whole or part by the Court, and enforced as a judgment. Rule 5. This makes an important alteration in the practice, as any Divisional Court or Judge of Court of Appeal, as also the Court of Appeals may call in the aid of an Assessor specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such Assessor. Observe, "try and hear with the assistance of." No provision seems to be made that the Assessor shall be *sworn* "well and truly to try." He is called in to aid the Court or Judge, and then, too, by the Court of Appeal. It does

seem odd that such power is given to an Appellate Court—it would be in fact one of the Judges exercising original, and the balance of the Court, appellate jurisdiction. In cases where a question of science or skill is to be tried, it may be an improvement to have an Assessor called in; but I think some safeguards in carrying out the Act, will be required, which will no doubt be supplied by rules of Court. Rules 6 and 7 are so explicit, as I have stated them to you, that no further comment therein will be required from me. I will conclude this branch of the Act by saying that the alterations in pre-existing practice as to trial and procedure, are important, and I would recommend you to consult any text books existent therein, as well as to have a look out for rules that the Court will unquestionably make.

#### RULES OF LAW.

By sections 16 and 17 of the Act, certain rules of law are prescribed: the rules are under the sections. I will endeavour to summarize them, retaining the numbering as given in the Act, commenting on each, or groups, as I proceed.

By rules 2, 3, 4, and 5. The several Divisions of the High Court shall enforce equitable claims, and give effect as defences to equitable rights and equitable estates; also give relief in the same suit which the defendant in that suit may have against any other party in respect of the original subject of the cause or matter, whether the other person is a party to the cause or not. The object of these rules is, to have all matters determined by the rules of Equity, and not Common Law—to give effect to all equitable estates and rights, no matter what the law of the case may be, or whether the cause or matter is in the Queen's Bench, Common Pleas, or in the Chancery Division, it is the equitable right in the case that must be given effect to. The Courts must also not only give equitable relief as between the parties to the original suit, but also as between the defendant and any other party in reference to the same

subject matter. As an illustration, take the case of a defendant sued upon a bond, and a third party has indemnified him against that bond, the third party is made a party to the suit, and relief is given not only to the plaintiff against the original defendant, but to the defendant against this third party, it being a matter relative to the same subject matter. So in any such case. "*Ex uno disce omnes.*"

No cause or proceeding pending at any time in the High Court of Justice or the Court of Appeal, shall be restrained by prohibition or injunction, but the cause for which a prohibition or injunction may have been obtained, may be relied on by way of defence. The Court may stay the proceeding if it think fit, either at the instance of a party to the cause, or any other party, if such party could, if the Act had not been passed, have obtained an injunction. The student is not to understand that a prohibition or injunction cannot be obtained in any case, but only that no cause or proceeding pending in Court shall be stayed by prohibition or injunction—the remedy is to set up as a defence in the same suit what would formerly have been a ground for injunction either in the same or another Court. Parties now, who have a right to stay a matter at law on the ground of equity, need not go to the Court of Chancery to obtain an injunction to restrain the matter at law on equitable grounds, but he, if a defendant, must stay the proceedings; and if not a party to the cause, he may become a party to the cause for this purpose by petition.—The rule expressly mentions a person not a party to the cause, if such person could, before the Act passed, have obtained an injunction or prohibition—it is carrying out the general scheme of the Act in its entirety as well expressed in rules 7 and 8, which is to have all rights, whether of law or of equity, disposed of before the same tribunal—it is but one High Court, though in several Divisions—somewhere in the Court, though it may not be in one Division altogether, the parties are to get complete equity.

Section 17 of the Act, has certain Rules declaring the Law of Ontario as amended—these Rules are crystallizing

into Act of Parliament what before were for the most part judicial decisions or declare what the law or equity for the future shall be.

2.—Says that no claim of "*Cestui Que Trust*" against a trustee for property held on express trust shall be barred by the Statute of Limitations—note, the Rule does not apply to implied trusts—implied trusts still remain barred by the Statute of Limitations; but the Statute shall not apply to express trusts; this Rule it must be borne in mind only applies as between "*Cestui Que Trust*" and his trustee, not between other parties affected with trusts.

3.—An estate for life without impeachment for waste does not give a right to commit equitable waste. To comprehend this it is necessary to examine what equitable waste as distinguished from legal waste is. An illustration will best elucidate: there may be a clause in a lease for life that a tenant shall not be impeachable for waste, that would give him the right in law to cut down the timber on the place under lease, equity however steps in and says that this shall not give the privilege to the tenant to cut down ornamental trees, which were planted to add beauty to the place, or it may be to shelter the person on the premises; in other words equity controls the strict legal phrase by an equitable interpretation more consonant with what it adjudges was the spirit and intent of the parties to the lease. So in any case where the strict law used gives the right to commit waste, the excessive use of that power is deemed in equity to be unjust, and so controls it with reference to what it considers the parties intended.

4.—There is to be no merger by operation of law only, of estates except the parties so intended. Merger was where a larger and lesser estate came together without any intermediate estate; in that case the lesser estate swallowed up or merged in the greater, and so was destroyed absolutely. Such however may not have been the intention of the parties; this Rule is to give effect to that intention. I cannot do better than refer you to the case of *Molson's Bank v. McDonald* 2 App. Rp. 102, to exemplify this Rule, and the doctrine of merger.

5.—Mortgagor entitled to be in possession may sue for trespass, and for rent, and may distrain. A mortgage more frequently than otherwise contains a clause that the mortgagor may remain in possession till default. This has been held to be a re-demise by the mortgagee to the mortgagor till default. As the mortgage is but a charge on the land in equity—the mortgagor being considered in equity the owner—the purport of this Rule is, that he should have all the rights of estate as if he was legal as well as equitable owner, and so exercised the legal rights of action for trespass or for rent accruing to him, or to distrain for overdue rents.

No. 6.—Parties liable on a chose in action receiving notice that some other party claims to be assignee thereof, may obtain interpleader, and have the right determined between the original creditor or party having the original right and the assignee of that right or chose in action, as the right is termed.

This is but applying the law of interpleader as affecting legal rights to rights or choses in action which are transferable in equity but not at law. A familiar illustration will be that of a due bill. A due bill is a chose in action giving a legal right to the party to whom it is given to recover the amount from the giver of the bill. The party to whom it is given assigns it over to a third party. The third party gives notice to the debtor that he owns this claim—his right to it may still be disputed by the original creditor or some other party. In that case the original debtor may interplead and have the disputed right contested by such other parties, he being willing to pay the party found entitled on the interpleader. This exemplifies this rule.

No. 7.—Stipulations in contracts as to time or otherwise are not to be deemed of the essence of the contract unless so construed by the Court of Equity.

Courts of Equity hold that time shall not be of the essence of a contract, unless the contract itself clearly and distinctly states that time shall form the essence of the

contract; either party may by reasonable notice, however, make time the essence of the contract.

8.—A mandamus or injunction may be granted or Receiver appointed by interlocutory order of Court, and either before, or at hearing, and as against trespassers as well as parties claiming a right.

The principle to be deduced from this Rule is, that hereafter injunctions may be obtained to prevent any threatened trespass or waste, whether the party against whom the injunction is sought, is or is not in possession under a claim of title, or is a bare trespasser, and applies whether the estate is claimed by either as legal or equitable. It having been held that injunctions would not be granted against mere trespassers setting up no claim of right, but that the party must take his legal remedy by action. This Rule is to get over that objection; it also gives a right to obtain a Receiver in Common Law as well as equity matters. The jurisdiction was formerly exclusively confined to Courts of Equity: it may now be obtained in any Division of the High Court, both in legal and equitable matters.

9.—In relation to the custody of infants, doctrines of equity to prevail.

This Rule is made to control the strict Rule of the Common Law, which gave the custody of infants to the Father even as against the Mother, but the Court of Chancery under extreme circumstances exercised the power of removing the infant from the control of the Father. There having been so much conflict of jurisdiction in this matter the Legislature have thought proper to adopt the equitable doctrine. You may refer to the following cases as bearing on this subject: *Re Taylor*, 11 Simons 178; *Re Bartlett*, 12 Collyer 661; and to Revised Statutes of Ontario, cap. 130 and cap. 132.

10.—When there is a conflict between Rules of Law and Equity, the Rules of Equity must prevail.

This Rule is a speaking one. You have only to bear in mind that the Equity Rules govern when there is a conflict between these and the Common Law Rules.

In my next lecture, I will take up the Orders, first in the aggregate and then in the concrete. Making some general observations on them as a whole; and then, if time permits, taking up each Order, making comments on each, or at least on those which have not been in every day practice heretofore—feeling that those more especially engaged in Common Law Practice, will require to give attention; though it will be found that in the Orders there is an admixture to some extent of Common Law and Equity Practice. I shall only give the gist of the Orders, leaving to commentators on the Act to enlarge on the details of the Orders. All the Orders have Rules under them; and I will, during the course, refer to each important Rule.

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## LECTURE III.

## ORDERS.

In considering the Orders, I may remark generally, that they make important alterations in existing practice. The bill in Chancery is abolished—superseded by summons and claims; so is also the declaration at law. The answer in Chancery is abolished—superseded by defence. The specially endorsed writ, as it existed at law, is in another form continued. Pleadings will be at an end at the replication, unless a Judge otherwise orders. There will be no more rejoinders and sur-rejoinders, re-butters and sur-rebutters. Parties innumerable may be introduced into the same suit. Orders may be obtained for addition, subtraction, and division of parties as before remarked.

Rules *nisi* are abolished—superseded by motions and Orders *nisi*. The Equity practice is to be in vogue. Motions and notices of motion will be the Rule, as it has been in Chancery. Parties moving will support their motions and have the right of reply. New trials may in certain cases, be granted at the hearing. Causes may be adjourned in whole or in part. Counter claims may be established whether partaking of set-off or not. Generally it will be found that all matters in controversy between the parties, will be disposed of in the same suit. So much generally for the Orders. We will now take them up *seriatim*, with the Rules under the Orders.

## ORDER I.

- Rule—1. All actions and suits to be commenced by a proceeding called an action.
- “ 2. Interpleader to *all* actions and to all divisions of the High Court.
- “ 3. The administration of deceased persons estate clauses of the Chancery rules, to apply to the High Court, and all Divisions thereof.
- “ 4. All other proceedings subject to these Rules, to be made and taken in any Court in which any application or proceeding of like kind could have taken, if the Judicature Act had not been passed.

## ORDER II.—(2.)

- Rule—1. Every action in the High Court to be commenced by writ of summons—to be indorsed with the statement of the *nature* of claim made, or relief asked, and specifying the Division of the High Court, to which the action is assigned.
- “ 2. Party using more prolix forms of writs or indorsements thereon, is subject to pay costs.
- “ 3. Form of writ.
- “ 4. Form of writ, out of jurisdiction.
- “ 5. Writs to be tested of day of issue, in name of President of the High Court, and defendant notified to appear in ten days after service if served in Ontario.

## ORDER III.

- Rule—1. The indorsement on writ need not set forth the precise grounds of complaint, or precise remedy or relief that plaintiff claims. The Court, or Judge may give leave to amend the endorsement so as to extend it to any other cause of action, or any additional remedy or relief.

Rule—2. Form given of indorsements.

- “ 3. If *plaintiff* *sues* or *defendant* *sued* in representative capacity, the indorsement should shew it. (Form given).
- “ 4. When plaintiff seeks to recover a *debt* or *liquidated* demand, the writ of summons may be indorsed with the *particulars* of the amount sought to be recovered after giving credit for any payment or set off.
- “ 5. Specially endorsed writs, *besides* stating the *nature* of the claim, shall state the amount claimed for debt or in respect of such demand. (Form Appendix A.).
- “ 6. In case of *Partnership*, *Executorship*, or *ordinary trust* account, when the plaintiff desires to have the account taken in the first instance, the writ of summons shall be endorsed with a claim that such account be taken. (This Rule *not* to apply to administration suits.)
- “ 7. When writ claims foreclosure of mortgage, or sale of mortgaged property, and plaintiff desires an order for immediate delivery of possession, or for immediate payment, the writ must be so endorsed. (Form given.)
- “ 8. Plaintiff's Solicitor's name, or form *and* place of business must be endorsed on writ of summons, or on notice in lieu of writ. If the Solicitor is *agent* of *another*, the firm or place of the *principal* to be endorsed.
- “ 9. If plaintiff *sues* in person, he is to endorse on summons his *place of business* and *occupation*, or if his residence is more than two miles away from the office out of which the first process in the cause shall be issued, to endorse a place not more than two miles from such office, for service of writs and all other papers not requiring personal service. *Penalty of omission*.—Plaintiff can proceed by putting up notices, petitions, and warrants in office from which writ issued.

Rule—10. Plaintiff in any action whatever may issue a writ of summons in Toronto, (out of proper office) or in any County.

“ 11. Writs of summons in Queen’s Bench and Common Pleas Division to be issued by same officers as now and alternately, and in Chancery Division, by the proper officers hitherto attached to Chancery.

“ 12. Face of writ of summons to name the office in which defendant’s appearance to be entered.

“ 15. Plaintiff’s Solicitor to leave with the officer on presenting writ of summons for sealing, a copy of the writ and endorsements thereon signed by plaintiff’s Solicitor, or by plaintiff if he sues in person.

“ 16. Proper office to make entry in process book.

“ 17. Concurrent writs may issue.

“ 18. Concurrent writs to be marked as whether for service in or out of jurisdiction.

There is not much in these three orders that require comment. The Student should be careful to follow the directions of the Act as to the endorsements on writ. Aiming at getting final judgment for default of appearance, he should examine the notice of the claim to see if his suit can be specially endorsed, and if so, to so endorse it. It appears from Rules 4 and 5 that the specially endorsed writ must have something more than an endorsement stating the *nature* of the claim, viz. the *particulars* of the amount subject to be recovered, and the *amount* claimed for debt or liquidated demand. The same form of special endorsement will do as before the Judicature Act was passed. The forms to Act may be consulted as to what is the nature of the claim for which a writ may be specially endorsed. The examples in section 4 of the form, No. 7, headed “Money claims. Special endorsements under Order III. Rule 4” is the general character of claims intended—this is proven by the heading in the Part II. (2) of forms.

No. 4, which is "Money claims where *no* special endorsement under Order III. Rule 4." Comparing these it seems pretty clear that the character of claims proper for specially endorsed writs are those I have indicated, viz., those and the like of section 4, No. 7 of the forms.

The Order III. is an important one, as directing the Student to the beginning of his suit—"dimidium facti qui coepit habet,"—a good beginning may make a good ending, whereas a bad beginning will make a bad ending. The facility of obtaining orders to amend mistakes which may be made, will be gratifying to the Student. But it is far better not to have mistakes. Time is lost, and expense incurred in curing mistakes. In the 6th Rule, the "ordinary trust account," there referred to, means account of accounting parties; to cases where the fiduciary relation exists, one party being bound to account to another. Observe also the directions as to mode of endorsement in mortgage cases where you wish immediate payment and possession, and see Form No. 9 (*d*), Appendix A.

#### ORDER IV.

##### DISCLOSURE BY SOLICITOR AND PLAINTIFFS

#### ORDER V.

##### RENEWAL OF WRIT.

#### ORDER VI.

##### SERVICE OF WRIT OF SUMMONS.

- Rule—1. No service of writ required where defendant, by his solicitor, accepts service *and* undertakes to enter appearance.
- " 2. Where service required, service to be made as now; where personal service required and made to appear to Judge or Court on affidavit that plaintiff, for any cause, is unable to effect prompt personal service, the Court or Judge may make order for substitutional service.

Rule—3. Married women may be served the same as unmarried women.

- “ 4. Where action is for any purpose *other* than recovery of money from an infant defendant personally, or of land, goods, or chattels, of which the infant is personally in possession. Service on official guardian, for service on the infant if infant, resides in Ontario.
- (a) Where several infant defendants sufficient to serve one copy of and on guardian for all infant defendants.
- (b) From time of service, official guardian to be “guardian *ad litem*” for infant, and attend to his interest.
- (c) Any person interested may move before the Judge in Chambers for an order appointing a guardian *other* than the official guardian so served.
- “ 5. Where the action is against the infant for *recovery of money* from *him personally*, or for the recovery of lands, goods, or chattels of which he is personally in possession, service *shall* be on the infant personally, and one copy of writ *shall* also be posted (prepaid) to, or delivered at the office of the official guardian.
- “ 6. Lunatics not so found by injunction or judicial declaration, may be served by serving the committee, or on the person with whom the lunatic resides, or under whose care he is.
- “ 7. No further proceedings after such service on the lunatic, to be taken till guardian *ad litem* appointed.

#### SERVICE ON PARTNERS.

- “ 8. Service on one or more partners or their manager at their principal place of business in Ontario, sufficient for all.

Rule—9. Where a person carries on business in the name of the firm, service may be upon the manager at the place of business in Ontario.

“ 10. Service on Corporations or any Society or Fellowship, or any body or number of persons, may be as prescribed by any Statute directing the mode of service in such cases.

“ 11. Service in ejectment on vacant possession by posting the writ on the door of the dwelling house, or other conspicuous part of the property.

“ 12. Endorsement of service of writs to be as now.  
(a) Affidavit of service to mention day on which the service made.

## ORDER VII.

### SERVICE OUT OF ONTARIO.

Rule—1. Service of writ of summons out of Ontario, or notice of writ of summons may be allowed by the Court or Judge, in the following cases :

(a) Where the whole or any part of the subject matter of the action is property situate within Ontario, or is any act, will, or thing affecting such property.

(b) Where the contract which is sought to be enforced or annulled, or *otherwise* affected in any such action, or for the breach whereof damages or other relief are, or is demanded in such action, was made or entered into *within Ontario*.

(c) Where there has been a breach of contract within Ontario, wherever the contract made.

(d) Where any action or thing sought to be restrained or removed, or for which damages are sought to be recovered, or is to be done, is situate in Ontario.

- (e) Where the action is brought on contract or judgment, not within the four above cases, but the defendant has assets in Ontario.

#### TIME FOR SERVICE OUT OF ONTARIO.

Rule—2. *a, b, c, d.*

- “ 3. Court or Judge may order service in different manner or alter time for appearing.
- “ 4. Service made without previous order, may be allowed.
- “ 5. Notice in lieu of writ shall be served in same manner as writ of summons.

#### ORDER VIII.

##### APPEARANCE, &C.

Rule—1. All proceedings to final judgment to be carried on in the office from which writ is issued, unless the Judge otherwise directs.

- “ 2, 3, 4, 5. How appearance entered—viz., by delivering to the proper officer a memorandum in writing, same as required on endorsement of writs in cases of plaintiff suing by attorney or in person.
- “ 6. Form of memorandum given.
  - (a) In case defendant does not require plaintiff to deliver statement of claim, he shall so state in his memorandum of appearance, and in that case serve a copy of such appearance on the plaintiff.
- “ 7. Upon receipt of memorandum of appearance, officer to enter appearance in procedure book.
- “ 8. Partners sued in name of firm to appear individually in their own names—all subsequent proceedings continued in *name of firm*.

Rule—9. A person carrying on business in name of firm apparently consisting of more than one person, shall be sued in name of firm—shall appear in his own name—subsequent proceedings to be in name of firm.

“ 10. If several defendants appear by same solicitor at same time, memorandum of appearance to contain names of all so appearing.

“ 11. Solicitor not appearing in pursuance of *written* undertaking, to appear subject to attachment.

“ 12. Defendant may appear at any time before judgment—if he appears after time limited for appearance, to give notice thereof on same day to plaintiff's solicitor—entitled to no further time for delivering defence or any other purpose than if he had appeared according to writ, unless Court or Judge otherwise orders; if he omits to give the notice, plaintiff may proceed as in case of non-appearance.

“ 13. Appearance in ejectment by defendant not named in writ as defendant, may be *without leave* on filing affidavits that he is in possession by himself or tenant, and if defendant in writ is his tenant, he is so to state. Form of affidavit given. No. 33, Appendix C.

“ 14. When such affidavit as above is not filed, any person not named in writ may, by leave of Court or Judge, appear in ejectment, and defend on filing affidavit that he is in possession either by himself or tenant.

“ 15. Landlord appearing to defend in ejectment for land in possession of himself or his tenant, to state in *his appearance* that he defends as landlord.

“ 16. Where persons not named as defendants in writ of summons in ejectment, the appearance to be entitled in action against party who is named as defendant in writ, and forthwith

give notice to plaintiff's solicitor, and he (the person appearing) shall be named in all subsequent proceedings as a party to the action. If notice admitted, plaintiff may proceed as in case if no appearance.

“ 17. Person appearing may limit his defence as to part of land. (Practice in reference to same as at present.)

“ 18. Form of notice.

“ 19. Any person appearing to writ of summons in other cases, may limit his defence to question of amount to which plaintiff is entitled, and in his appearance or by notice states that he disputes amount only. Form of Notice, No. 15, Appendix B.

I make no comment on Orders V. and VI., as “to disclosure by solicitors and plaintiffs,” or “renewal of writs,” as the present practice is continued. As to Order VI. I would recommend the undertaking in Rule 1 to be procured in *writing*, otherwise the solicitor could not be attached. Note that married women may now be served as if unmarried, and so a change of practice in Common Law, though in Equity by General Order 13, she could be served as if a *feme sole*. I refer you to Rules 4 and 5. Rule 5 seems to be the exact opposite of Rule 4. By Rule 4 where the action is for the administration or partition of an estate in which an infant is interested or where the action is not for the recovery of money from an infant defendant personally, or not for the recovery of lands, &c., the service is to be on the official guardian; but where the action is for the recovery of money from him personally, &c., the infant is to be personally served. What is to be understood by the term money? Does it mean damages as well as a money demand? I think it does. Take an action for assault, for instance, in which the recovery is for damages, or any action of a like nature in which the infant is personally liable. I think in that case the infant should be personally served.

The only other Rules in Order VI., to which I need call your special attention, are Rules 8 and 9, relative to service on partners from which you will see that the rule of representation is adopted, it being sufficient to serve one partner or even the manager of their business for the whole firm which is made good service on all the members of the firm. Pay attention, however, to the subsequent proceedings as set forth in the Rule. Order VII. trials of service out of Ontario, in the cases mentioned in which such service may be made as I have given in detail, the service may be effected by a notice as well as writ. I must next refer you to the provisions contained in (b) and (c) in this order. These provisions set at rest what had been a vexed question, as to whether "cause of action," as expressed in 49th section of the Common Law Procedure Act, meant the whole cause of action or only that part of it which gives the plaintiff his cause of complaint or breach. If you refer to *Gildersleeve v. McDougall*, 31 U. C. C. P. 168, you will find the question much discussed. Until the decision of *Vaughan v. Weldon*, L. R. 10 C. P. 47, a difference of opinion had existed in the English Courts as to the construction of these words. The point was then set at rest where, after a conference of the Judges, it was held that it was sufficient that the breach of contract should have arisen within the jurisdiction. The Legislature of Ontario, by these provisions (b) and (c) as to contracts, has enacted that no matter where the contract is made, if there is a breach of that contract in Ontario, the party may be served out of the jurisdiction; thus enacting what in *Vaughan v. Weldon* was decided. If the contract is made in Ontario and the breach without Ontario, service may be made out of the jurisdiction. The words "affecting such land," in Order VII. (b), will not escape your attention. You will see that these words give a wide latitude in the matter of service. Very numerous cases may and will probably arise where this provision will be invoked to give jurisdiction. It will be impossible in the course of a lecture to do more than direct your

attention especially to it and by way of assistance refer you to decided cases on the subject. A reference to these cases and applying the Rules there laid down will guide you in coming to a correct conclusion in other cases. Refer then to the cases of *Creswell v. Parker*, L. R., 11 Ch. D. 601, and *Harris v. Fleming*, 13 Ch. D. 208.

There is but little in Order VIII. requiring special mention ; a bare reading of the Orders convey their full import. A defendant may waive a statement of claim other than is endorsed on the writ ; if he desires to waive and so save expense, he is to give notice to the plaintiff to that effect, by so stating in his appearance. The Orders as to limiting defence in ejectment to part of the property claimed, is in the main taken from the Ejectment Act, with which you are familiar. Directions are more specifically given as to the practice in ejectment, where a person who is not named a defendant in ejectment may appear ; and as to Landlord and Tenant, which are plain and need only be referred to, as I have done somewhat in detail in setting forth the provisions of the Order in this respect. As to limiting the defence to the question of amount, to which the plaintiff is entitled in other actions, it is a partial adaptation of the Chancery practice in mortgage suits. The object of the Rule is of course to confine the enquiry in the action to what the defendant may really mean to dispute, not his liability for something, but merely as to what amount the plaintiff is entitled recover.

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## LECTURE IV.

## ORDER IX.

## DEFAULT OF APPEARANCE.

- Rule—1. Where no appearance entered by the lunatic, plaintiff may apply to Judge or Court; that official guardian or some other proper person, be assigned the guardian of defendant to defend for him; but no such order to be made unless on hearing of application, it appear that the writ of summons was properly served and notice of application (6 clear days) given, served upon or left at the dwelling house of the person with whom or under whose care such defendant was at the time of service of such summons.
- “ 2. In case the infant defendant who has been served with a writ of summons otherwise than by the same being served on the official guardian, if no guardian *ad litem* appointed in seven days after the time expired for appearance, plaintiff may serve official guardian with notice of said particulars, and he then represents the defendant and takes all the necessary steps for his defence.
- “ 3. Where defendant makes default in appearing, and plaintiff is desirous of proceeding against him as an accounting party, plaintiff, before

taking such proceedings on default, shall file an affidavit of service of writ or notice in lieu of service.

Rule—4. Where writ specially endorsed, plaintiff may sign final judgment for the amount not exceeding amount endorsed, and issue execution at expiry of eight days from day for appearance.

“ 5. Where there are several defendants to specially endorsed writ, plaintiff in default of appearance by any, may sign judgment against him or them, and go on with the case against those who do appear.

“ 6. Where the claim is for debt or liquidated demand only, and writ not specially endorsed, and defendant fails to appear, no statement of claim, need afterwards be delivered, but plaintiff may file affidavit of service of summons or notice in lieu of service, and file and serve a statement of the *particulars* of his claim in respect of the causes of action endorsed on the writ, and may after expiration of eight days, enter judgment for the amount thereon, thereby provided it is no more than endorsed on the writ.

“ 7. Where defendant fails to appear, and claim is for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and the damages assessed, a High Court or Judge may, in order to ascertain the value of goods and damages, or either of them, refer it to be ascertained in any other way in which any question in an action may be tried.

“ 8. In an action for the recovery of land, plaintiff to be entitled to enter judgment in default of appearance, for the whole or for such part as defendant has not defended for.

Rule—9. When plaintiff has endorsed claim for *mesne* profits, arrears of rent, or damages for breach of contract upon writ for recovery of land, he may enter judgment for the land and proceed as in the preceding rules as to such other claim so endorsed.

“ 10. Plaintiff is entitled to judgment on *præcipe* in foreclosure and redemption suits, or administration or partition suits, on such evidence, and in such cases (as nearly as may be) as provided by the present practice of the Court of Chancery in that behalf.

“ 11. Where suit is for foreclosure or redemption of mortgage, or sale of mortgaged premises, if plaintiff's, is not entitled to judgment or order on *præcipe*, he shall be entitled to the proper order on notice.

## ORDER X.

### LEAVE TO SIGN JUDGMENT WHEN WRIT SPECIALLY ENDORSED.

Rule 1.—When defendant appears to writ of summons (specially endorsed) and plaintiff not entitled to judgment or order under preceding order, plaintiff may, on affidavit of himself or of any other person who can swear positively to debt or cause of action, and believes there is no defence on service of notice of motion, obtain order for leave to sign judgment.

“ 3. Defendant may shew cause against application by offering to bring into Court the sum endorsed on writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or part only, and if so, what part of plaintiff's claim.

“ 4. If defence should apply to part only, and defendant admit part, plaintiff to have judgment for part admitted.

Rule—5. If it appears to Judge that a defendant has a good defence and other defendants have not, plaintiff may enter judgment against the one who has no defence and proceed against the others.

“ 6. Leave to defend may be absolute or conditional.

The Rules of Order IX. to which I wish to direct your attention are Rules 4, 5, 6, 10, 11. I refer to Rule 4 as there you find the former Common Law practice carried out as to specially endorsed writs. In my remarks in the first lecture I gave when speaking of what I considered to be the Special Endorsements intended, I referred you to Section 4 No. 7 of forms as “Money Claims—Special Endorsements under Order III. Rule 4” as intended. Rule 6, speaks of “Debts or liquidated demands” claimed, yet *not claimed* on a *Writ Specially* endorsed. In that case you will perceive in case the defendant fail to appear instead of statement of claim, you file and serve a *statement of particulars of claim*—and then after 8 days enter judgment, if defendant has not appeared within the time *specified in Writ* for appearance. In other words the “*statement of particulars of claim*” answers the purpose of the Statement of Claims, or the Specially Endorsed Writ, and also shews that the specially endorsed writ should have some particulars of claim of this character in the form to which I have above referred.

Rule 5 shews that a better Rule is to prevail than heretofore, viz. you do not abandon other defendants by signing judgment against one of several defendants who may make default, but go on against them in the usual way. The Students who have been practising in Equity Chambers will appreciate the meaning of Rules 10 and 11. I need only refer them to the Chancery Orders Nos. 426 *et seq.*; 645 *et seq.*; 467 *et seq.*; 638 *et seq.*

The 1st Rule of Order X. alters the present practice. By that Rule when defendant appears to a specially endorsed writ but plaintiff is not entitled to judgment or

order under Order IV. he may, nevertheless, get a speedy judgment by making affidavit himself, or getting some third party to make affidavit verifying the cause of action, and his belief there is no defence procure an order of a Judge to sign judgment, unless defendant satisfies Judge he has a good defence.

## ORDER XI.

APPLICATION FOR ACCOUNT—WHERE WRIT ENDORSED UNDER ORDER III. RULE 6.

- Rule 1. }  
 2. } In default of appearance if plaintiff cannot get  
 3. } order on *Præcipe*, he may get it on motion.

## ORDER XII.

### PARTIES.

- Rule 1. }  
 and 3. } All persons may be joined as plaintiffs or  
 defendants in whom the right to any relief is  
 alleged to exist, whether jointly, severally, or  
 in the alternative.
- “ 2. If action commenced in name of any plaintiff, or even if it be doubtful whether he is the right plaintiff, a Judge may allow another plaintiff to be added or substituted.
- “ 4. Not necessary that every defendant shall be interested as to *all* the relief prayed, or as to every cause of action included therein.
- “ 5. All parties jointly and severally or severally liable on one contract may be joined as defendants.
- “ 6. If plaintiff in doubt as to whom he is entitled to get redress from, he may join several defendants in order to have the doubt determined.
- “ 7. Trustees, executors, and administrators may sue or be sued, without joining any of the parties beneficially interested.

Rule—8. Infants may sue as plaintiffs by their next friend, and defend by guardian.

“ 9. Married women may sue or defend without their husbands in all cases relating to their separate estate, or to their separate engagements, in other cases may sue by their next friend.

“ 10. Where parties are numerous, having the same interest in one action one or more may sue or be sued or authorized by the Court to defend on behalf of parties so interested.

“ 11. Court may in case of doubt as to who is heir or next of kin, arising from the construction of an instrument direct the case to proceed, subject to enquiry as to that fact, appointing some person in the mean time to represent the heir or next of kin.

“ 12. Partners may sue or be sued in the name of their respective firms.

“ 13. Persons trading under a firm's name, may be sued in the name of such firm.

“ 14. Chancery Orders 58, 59, 60, and 61 in force as to High Court.

“ 15. Misjoinder. No action to be defeated by reason of—Court may deal with matter so far as regards the parties actually before it.

“ 16. Application to add, strike out, or substitute plaintiff or defendants, may be made before trial by motion, or at trial in a summary manner.

“ 17. Where new defendant added, writ to be amended.

“ 18. If statement of claim previously delivered, it shall be amended to meet the case of the new defendant being added.

“ 19. Whenever it appears to the Court or Judge that a question in action should be determined not only as between plaintiff and defendant,

but between plaintiff and defendant and any other person, or either of them, the Court or Judge may, on notice to such last mentioned person, make such order as may be proper to have question so determined, and regulate the mode of giving notice, and to whom to be given.

Rule—20.

(a) }  
(b) } How notice to be served, &c.  
(c) }

- “ 22. If person not a party to the action served under Rules 19 and 20, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter appearance, &c.
- “ 23. Court or Judge may direct the mode of having the question in the action determined.
- “ 24. Plaintiff is not to be delayed in his proceedings by reason of question to be determined between defendants.
- “ 25. Service of notice on persons of unsound mind in same manner as writ of summons.
- “ 26. Parties to administration proceedings. No person other than executor or administrator shall appear in Chambers or Court on the claim of any one not a party to the cause against the estate of deceased in respect of any debt or liability.

This Order XII., as to parties, makes changes in the practice heretofore existing either in the Common Law Courts or the Court of Chancery, of a very radical character. The 1st rule will create much controversy as to what is intended. I read Rules 1 and 3 together, as one applies to plaintiffs and the other to defendants—“jointly, severally, or in the alternative.” Take the case of several parties libelled in a newspaper article. They could not formerly have maintained an action jointly, as the tort or

wrong was a wrong done to each, and each had to maintain a separate action for the wrong done to himself. Can they now, (all the parties libelled,) join in one action for the wrong?

The Rule seems to comprehend such a case or case of a like nature. The subject has been discussed in England in the Queen's Bench Division, *Booth v. Briscoe*, L. R. Q. B. D., 498, where it was held that the several parties libelled could join in one action. In the like case, the cause of action in the libel was all in one document. But how will it be when several persons who have a right to relief, have that right in respect of a matter or matters quite distinct from each other? Can they all be joined as plaintiffs? The rule is large enough in terms to include such a case, but I doubt if it will be allowed. If allowed, there might be an infinity of plaintiffs and an infinity of matters in the same action. I think the relief claimed where several persons are made plaintiffs, it must be a relief in respect of a subject matter, they are severally interested or jointly interested, or have an alternative of being entitled to one remedy or to another. I do not see how Rules 1 and 3 are to be carried out successfully unless some such rule is adopted. It may be that I give the rule too narrow an interpretation. We must only wait to see how far the rule will be construed by the Courts. It is fortunate that the word *may* is in the Rule, rather than the word *shall*: "all persons *may* be joined as plaintiffs," &c.

Rule 2 is a beneficial one; formerly if a mistake were made in bringing the action in the name of a wrong plaintiff, the mistake might not be found out till too late in the action. The action would then have to be discontinued. Now the Court or Judge may cure the mistake by amendment, adding another party or parties as plaintiff, or substituting some other party as plaintiff. Rule 6, we may term a *fishing* Rule. It allows to a plaintiff when in doubt as to who should be the defendants in the action, to join several, and leave the Court to solve the doubt for him by determining who is or who is not the proper defendant

or defendants. Rule 7, is adopting the Chancery rule, allowing trustees, executors, and administrators who represent other parties, to sue on behalf of such other parties, or be sued as representing the property or estate of which they are trustees or representatives, without joining the parties beneficially interested. Rule 9 as to married women suing or being sued without their husbands in respect of their separate estate, does not mean in respect of their separate estate in the old equity sense of the term, as property vested in trustees for the separate use of the married woman, but means separate estate or estate considered separate estate under the Married Woman's Act. Rule 10 is the adoption of the Chancery rule, that where there are several parties in the same interest as creditors, the bill should be, and now the summons or suit may be brought on behalf of all other parties in the same interest, and so one of several parties in the same interest may be authorized by the Court to defend for all the parties. Rule 15 imposes on the Court the duty of dealing with the matter in dispute so far as regards the rights and interest of the parties actually before it, notwithstanding the misjoinder of parties.

Rule 19 is a beneficial Rule and carries out the spirit of the Act. The purpose of the Rule is not only to determine in one action the claim that plaintiff may have against a defendant, but also the claim that defendant may have against a third party to indemnify him the defendant! In such case, why should there be two actions, why may not the whole matter be determined in one action? I will give you a couple of illustrations. Take the case of B giving A a bond for a debt, and suppose C had given a bond to B to indemnify him against the bond he, B, had given to A. B being sued may claim to be indemnified by C, and if he do so, the Court or Judge may order not only the question between A and B to be tried, but the question between A and B and between A, B, and C on the bond of indemnity, to be tried in the same action. Or take any case in which a defendant claims that other parties besides

himself, should contribute to the payment of plaintiff's claim against him; he may procure such other parties to be made defendants so as to have the whole matter determined in the same action, and so save the necessity of his resorting to a separate action. Rule 26 is intended to meet what has been a grievance, viz., that every creditor proving a claim, could have a separate solicitor, and so costs intolerably increased. The remaining Rules of this Order are simple and mostly matters of form, to which I need make no special reference.

### ORDER XIII.

#### JOINDER OF CAUSES OF ACTION.

- Rule—1. Plaintiff may unite in same action and statement of claim several causes of action, but the Court or Judge may order separate trials or make other order.
- “ 2. No cause of action to be joined with action for recovery of land, except for mesne profits or arrears of rent in respect of premises claimed and damages for breach of any contract under which the same or any part thereof is held, except claims in actions on mortgages for the recovery of mortgage moneys and foreclosure or sale.
- “ 3. Claims by assignee in insolvency not to be joined with claim by him in other capacity.
- “ 4. Claims against husband and wife jointly, may be joined with claims against either of them severally.
- “ 5. Claims by and against executors or administrators as such, may be joined with claims against him personally, provided the claim last mentioned arise in reference to estate, of which he is executor or administrator.

Rule—6. Claims by plaintiffs jointly, may be joined with claims, and by them or any of them separately, but the Judge may order separate trials.

“ 8. Defendant may move to strike out cause of action, and have the trial confined to such of them as may be conveniently disposed of in one proceeding.

“ 9. Judge may order the striking out and proceedings amended accordingly.

The several causes of action under Rule 1 of Order XIII., may be several separate and distinct causes of action having no reference whatever to one another. A may in the same action claim that he is entitled to redress against B as agent of C., or if not so entitled, he is entitled to redress against C, and formulate his claim accordingly ; or he may have separate alternative causes of action against the same defendant. In one case an action of this kind was sustained ; the plaintiff claimed that one defendant B was under contract with him the plaintiff to personally have care of his son, and had broken his contract ; and that C, a medical man, had negligently treated this son of plaintiff in his illness, and joined them in the same action. Here we have quite distinct causes of action, and against separate defendants.

I cannot but think that this Rule, unless modified or controlled by Rules to be made by the Judges, will lead to many difficulties. Under Rule 2 of this Order, it has been held that a foreclosure suit is not an action for the recovery of land. The remaining Rules of this Order need no comment, they are plain and distinct.

#### ORDERS XIV.

##### ACTIONS BY AND AGAINST LUNATICS AND PERSONS OF UNSOUND MIND.

Rule—1. Lunatics may sue and be sued as before the Act, by committee or next friend.

## LECTURE V.

## ORDER XV.

## PLEADINGS GENERALLY.

Rule—1. Old Rules abolished.

- “ 2. Unless a defendant at time of his appearance does not therewith state that he does not require statement of claim, the plaintiff is to deliver to defendant a statement of the relief or remedy he claims to be entitled to.
- (a) The defendant to deliver statement of his defence, set off, or counter claim.
- (b) Plaintiff in like manner to deliver statement in reply.
- (c) Statement to be as brief as nature of claim will allow, under penalty of paying costs.
- “ 3. Defendant may set up counter claim whether sound in damages or not.
- (a) The counter claim to be same in effect as cross action—Court to determine the whole.
- (b) Court or Judge may by Special Order disallow the counter claim to be presented.
- “ 4. Every pleading to be concise—to state material facts, but not evidence—to be in paragraphs numbered consecutively—each paragraph to contain separate allegation ; dates, sums, and numbers to be expressed in figures, and not words.
- 5 & 6. Pleadings may be printed or partly printed.

Rule—7. Pleadings to be served on Solicitor or on defendant in person if he so appears, or posted in office from which writ issued, if he do not appear.

“ 8. Pleading to have marked on its face date of filing: a reference to the Division to which action is assigned; title of action; description of pleading and name and place of business of Solicitor.

“ 9. Every statement of claim shall state *specifically* Plaintiff's claim, either simply or in alternative, and may also ask for general relief. Same Rule to apply to counter claim and statement of defence.

“ 10. Where plaintiff has several distinct claims, he shall state them separately, and the facts in relation to each stated separately, and so as to defence and counter claims.

“ 11. *Effect* of document may be stated.

“ 12. Malice—fraudulent intention or knowledge may be alleged as a fact without setting out the circumstances.

“ 13. Notice may be alleged as a fact, unless the form of notice or precise terms are material.

“ 14. Where contract implied from letters, conversations or circumstances it is sufficient to allege the contract or relation as a fact, and refer generally to the letters or circumstances, &c., without setting them out in detail, or if the claim is an alternative one, it should be alleged.

“ 15. Facts presumed need not be stated.

“ 16. In pleading, should deny representative capacity specifically, and so as to partnership firm.

“ 17. Bare denial of contract denies the making only of contract; special defence of illegality; Statute of Frauds &c. to be pleaded specially.

“ 18. No plea or defence to be pleaded in abatement.

“ 19. No new assignments.

Rule—20. Defendant in action for recovery of lands need not plead his title, unless his defence depends on equitable estate or right, or he claims relief on equitable grounds against plaintiff's asserted right: except as aforesaid, all he need plead is "That he is in possession" and he may nevertheless rely upon any ground of defence he can prove.

- " 21 Nothing in Rules is to prevent plea of "Not guilty by Statute."
- " 23. The pleading should allege all such facts as the party relies on, so that the opposite party may not be taken by surprise.
- " 24. Silence not to give consent, or amount to an admission in pleading.
- " 25. Subsequent pleadings should not raise any new ground of claim, or contain any allegation of fact inconsistent with such party's previous pleading.
- " 26. Delivering pleading, includes by the term, filing, when the practice has been to file.

This Order XV. in general adopts the system of pleading that has prevailed in equity; the pleadings close in general at the replication. This was the practice in equity before the Act. The replication joined the issue. There is, however, to be no more answers as it has been the practice; the term pleading supersedes the answer; and no pleading requires to be sworn to. Counter claims come in for the first time. You know that a set-off could be pleaded; but here we have counter claims allowed. The defendant's counter claim may be a claim for damages, it may be for assault, slander, libel, trespass, or in fact any thing that might form the ground of a cross action. When it is considered how many different plaintiffs there may be in a suit, how many separate causes of action, and how many defendants, you will at once see what a load a case may have to carry in the future; and the plaintiff, before

the commencing his suit, will have to consider what counter claims he may provoke. Rule 20, as to defences in actions for recovery of land, allowing defendant except in equitable defence, to plead simply "that he is in possession," and under that plea rely upon any ground of defence he can prove, is likely to lead to inconvenience. I see nothing to prevent the plaintiff being taken wholly by surprise as to the defence that may be set up. I think the Common Law Rule was a better one which required the defendant to set up his title, as if he claimed under a lease to so state it; or any other defence where he meant not only to deny the plaintiff's title, but to set up title in himself, New assignments are abolished. As at Common Law from the generality of the declaration, the defendant might mistake the plaintiff's cause of action having a perfectly good defence to the one he is pleading to; but not to the one the plaintiff intended, and so the plaintiff *new assigned* so as to give the defendant more definite information as to what he intended; instead of new assigning he will now amend his declaration. The digest I have given you of the rules so specifically explains them, that I need now only refer to another Rule 3 and Rule 25. Plaintiff and defendant will have to be particular in their pleadings so as not to state in a subsequent pleading, facts that are consistent with former pleading in same suit.

## ORDER XVI.

### PLEADING MATTERS ARISING PENDING THE ACTION.

Rules 1, 2, 3, 4, 5, 6, 7.—Generally it may be stated that this Order does away with audita "*audita querela*," or pleas "*puis darrein continuance*," and allows a party after his last pleading to plead any new facts that have since arisen either to support his claim or for his defence, and have his pleadings amended accordingly on præcipe and affidavit of the new matter having arisen within eight days next before the amendment.

## ORDER XVII.

## STATEMENT OF CLAIM.

The substance of this Order is, that plaintiff is to deliver his statement of claim within three months after defendant's appearance. If defendant states that he does not require a statement, plaintiff shall file a copy of his summons and the endorsements thereon within same time, and when the writ is specially endorsed, and defendant does not dispense with statement, plaintiff may file copy of writ with endorsement thereon, and notify defendant that that is his claim, viz., the endorsement (gives form of notice.)

## ORDER XVIII.

## DEFENCE.

- Rule—1. Defence to be delivered in eight days from delivery of statement of claim, or time limited for appearance, whichever is last.
- “ 2. Defendant who has waived statement of claim, may deliver his defence in eight days after appearance.
- “ 5. When defendant, by his defence, sets up counter claim against plaintiff and other parties, he is to add to the title of his defence a further title similar to the title in statement of claim who the parties are against whom, if counter claims were to be enforced by cross action, would be the defendants to the cross action, and deliver his defence to such of them as are parties to action within period within which he is to deliver to plaintiff.
- “ 6&7. Where the third person in preceding rule is not a party to the action, he is to be summoned to appear by being served with a copy of defence, and must appear thereto as if he had been served with writ of summons to appear (and same practice as to service of writ ensues.

Rule—8. Such third party may deliver reply within time he might deliver defence, if it were a statement of claim.

“ 9. Any party may move to strike out counter claim.

“ 10. If a balance is found due defendant in set-off or counter claim, he is to have judgment for such balance.

### ORDER XIX.

#### DISCONTINUANCE.

Rule—1. Plaintiff, at any time before receipt of defendant's statement of defence, or after receipt thereof before taking any other proceeding in action by *notice in writing*, may discontinue his action, or any part of it, and pay costs.

“ (a) Such discontinuance not to be a defence to any subsequent action.

“ (b) Save as aforesaid, record can only be withdrawn, or action discontinued, by Judge's order.

“ (c) Court may order (upon terms) defence or any part thereof, to be struck out.

“ 3. Judgment may be signed for costs of discontinuance.

### ORDER XX.

#### REPLY AND SUBSEQUENT PLEADINGS.

Rule—1. Plaintiff to reply within three weeks after defence or last defence.

“ 2. No pleading subsequent to replication without Judge's order.

### ORDER XXI.

#### CLOSE OF PLEADINGS.

Rule—Pleadings deemed closed as soon as a party has joined issue upon any pleading of opposite party simply.

## ORDER XXII.

## ISSUES.

Rule—Judge may settle issues if he thinks the facts as stated do not fairly bring up the real question in dispute.

## ORDER XXIII.

## AMENDMENT OF PLEADINGS.

Rules 1 to 11.—The substance of this order is (1) That Court or Judge may amend at any stage of cause: (2) That plaintiff and defendant may both amend once as of course, and when they do so, opposite party may alter his pleading: (3) That alterations, *i. e.* amendments may be by written alterations in copies filed and served, and by additions on paper to be interleaved therewith, if the amendment is more than two hundred words in one place, or difficult, &c., amendment to be made by delivering fresh copy—when pleading amended, date to be given, and date of amendment—amendment to be in ink of different colours. \*

## ORDER XXIV.

## DEMURRER.

- Rule—1. Demurrer may be to whole or part of pleading.
- “ 2. Demurrer to state whether to whole or part; if to part—what part? Ground in law to be stated. (Form given.)
- “ 3. Demurrer to be delivered in same time as any other pleading.
- “ 4. Demurrer and statement of defence to be contained in one pleading.
- “ 5. There may be a plea and demurrer to same pleading without leave.
- “ 6. If party wishes to demur and plead without filing affidavit, in 5th Rule, he can apply to Court on affidavit, same as now required in Superior Court of Law.

Rule—7. Either party may immediately enter demurrer for argument.

(a) Demurrer held sufficient if party demurred to does not within ten days after delivery of demurrer amend.

“ 8. No amendment while demurrer pending without leave of Court.

“ 9. Party to have cost of successful demurrer.

“ 10. If demurrer to whole cause of action allowed the plaintiff to pay costs of action.

“ 11. When a demurrer to pleading or part of pleading not within Rule 10 is allowed, that part to be struk out of pleadings.

“ 12. When demurrer over-ruled the unsuccessful party to pay costs.

“ 13. After over-ruling demurrer, Court may allow party to plead.

“ 14. Form of entering judgment.

## ORDER XXV.

### DEFAULT OF PLEADING.

Rule—1. If plaintiff being bound to deliver a statement does not do so in the time required to do so, defendant may move Judge to dismiss prosecution.

2 & 3. If plaintiff's claim be only for a debt or liquidated demand, and defendant does not within the time allowed for that purpose, deliver a defence or demurrer, plaintiff may enter final judgment for amount of part claim and costs, (3) or if in such case there are several defendants, and one makes default, plaintiff may enter judgment against the one making default without prejudice to his right to proceed against the others.

“ 4. If plaintiff's claim be for detention of goods or damages, and defence not entered in time,

plaintiff may have damages assessed, or obtain order of reference to have value or amount ascertained.

Rule—5. So in case of several defendants may enter interlocutory judgment against the one making default, and proceed against the others, and have at trial damages assessed against the one making default, and have issue tried as to others.

“ 6. So in case claim be for detention of goods, and also for debt, or liquidated demand may proceed in same way.

“ 7. In case of action for recovery of land if defendant makes default and defence not in time, plaintiff may sign judgment.

“ 8. In case claim is for mesne profits, arrears of rent, or damages for breach of contract, same result to follow.

“ 9. In all other actions, if defendant makes default in delivering defence or demurrer, plaintiff may set the case down on motion for judgment, and such judgment shall be given as upon the statement of claim the Court consider plaintiff entitled to.

“ 10. Where several defendants, plaintiff may set the case down at once on motion for judgment against defendant making default, *or* may set down against him at the time when it is entered for trial *or* set down on motion against other defendants.

“ 11. In cases in which issues arise other than between plaintiff and defendant, opposite party may apply to the Judge for such judgment as he on pleadings may appear entitled to.

## ORDER XXVI.

## PAYMENT INTO COURT IN SATISFACTION.

Rules 1, 2, 3, 4.—The substance of these Rules is, that in any action for debt or damages any defendant may, after service of writ and before or at time of defence delivered, pay money into Court in satisfaction and plead such payment; by leave of Court or Judge, the payment in may be at a later period. It will be seen that the old Rule is extended to “any action for debt or damages;” and that a party has not now to wait till he pleads to pay money in, but may do it before or at the time of delivering his defence. The order provides for the acceptance or not by plaintiff of the money in satisfaction, (form given as to notice of acceptance.)

## ORDER XXVII.

## DISCOVERY AND INSPECTION.

Rules 1 to 19.—This Order and the rules under it continues the old practice as to discovery and inspection with but little variation. The principal variation is, that now the examination may be had before issue joined; formerly the examination could not be enforced at law till after issue joined, and in Chancery after answer. Under the English Rule similar to the 3rd Rule of this Order, which enacts “that it shall be lawful for the Court or a Judge at any time during the pendency of an action or proceeding, to order the production by any party thereto upon oath of such of the documents in his possession or power, relating to any matter *in question* in such action or proceeding,” &c., it has been held that the order for production will not, as a *general* rule, be made till after a statement of the defence is delivered. There may, however, be special cases where it may be made before that time.

## ORDER XXVIII.

## ADMISSIONS.

Rule—1. Each party is to admit such of the material statements of the opposite party as are true, or he may give notice that he admits all or any part of plaintiff's claim or defendant's defence.

Rule—2, 3, 4. Present practice retained. I need only refer you to the Rules.

## ORDER XXIX.

## INQUIRIES AND ACCOUNTS.

The only new and special matter contained in this order is, that in any cause or matter the Court or Judge may, at any stage of the proceedings, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner; and the official or other Referee is given all the powers of Judge as to amending; he is to examine all parties as an arbitrator, and make his report to the Court, the report of course is not final, but for the information of the Court. You will perceive that the Court, under the order, may relieve themselves of a vast deal of detail work, reserving the final determination of the cause or matter till after the Referee's report is received and confirmed.

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## LECTURE VI.

## ORDER XXX.

## QUESTIONS OF LAW.

This Order provides for presenting special case to the Court on concurrence of both parties, and is hardly students' work, so I pass on, except to say that under Rule 2 of this order that the Court or Judge, if so disposed may at any time during the progress of a cause, order that any question of law in the case shall be decided before any evidence taken, or any question or issue of fact is tried.

## ORDER XXXI.

## TRIAL.

- Rule—1. No local venue, except in ejectment. Plaintiff in his statement of claim is to name the County Town in which he purposes the action shall be tried, and trial to be in such town unless the Judge otherwise orders.
- “ 2. Provides for giving notice of trial.
- “ 3. Court or Judge may, in any action at any time, order that different questions of fact therein be tried by different modes, and some before others, and may appoint the place or places for such trial or trials.
- “ 4. Trial by jury to be before single Judge, unless otherwise specially ordered.
- “ 5. Form of notice of trial.
- “ 6. Ten days notice of trial.
- “ 7. Notice of trial to be given before entering action for trial.
- “ 8. Action may be entered for trial after notice of trial given.

- Rule—9. Party entering action for trial to deliver certified copy of pleadings to the proper officer *on the day* before holding of Court, at which action to be tried.
- “ 10. Judges may order actions in Chancery Division at separate time or before another Judge.
- “ 11. Actions in all Divisions to be entered not later than 3rd day next before first day of sittings.
- “ 12. Where Deputy Clerk of Crown and Deputy Registrar not same person, actions to be entered with Deputy Clerk of Crown, except in cases under Rules 10 and 13.
- “ 13. If provision made for trial at separate time and place of actions brought in Chancery Division actions to be entered for trial with Registrar or Deputy Registrar according to present practice.
- “ 14. Party entering action for trial to indorse on certified copy of pleadings delivered whether trial is to be assesment of damages or defended or undefended issue.
- “ 15. When case called on for trial, plaintiff to prove his case so far as burden of proof on him if defendant does not appear.
- “ 16. If plaintiff fails to appear when action called on and defendant appears, defendant entitled to judgment, dismissing action, but may prove counter claim.
- “ 17. Applications may be made at the sittings to set aside verdict in cases in Rules 15 and 16, one party appearing and the other not.
- “ 18. Where, through accident or mistake, any party omits to prove material fact, trial may proceed subject to such fact being proved, and the Judge may direct jury to find verdict as if fact proved, and verdict shall take effect on fact being afterwards proved as directed. This Rule not to apply to action for libel.

- “ 19. Judge may adjourn and postpone trial.
- “ 20. Judge may at or after trial direct judgment for either party, or adjourn case for further consideration.
- “ 21. Registrar or Clerk to enter findings of fact as Judge at trial directs, and directions, if any, of Judge, is to be endorsed on certified copy of pleadings.
- “ 22. Such indorsement authority to proper officer for entering judgment.
- “ 23. Referee, when any cause or matter referred to him, may hold the trial at or adjourn to any place and have inspection either by himself or with assessors.
- “ 24. Trial before Referee same as before Judge of High Court, but not a public court.
- “ 25 & 26. Referee has powers of Judge, except he cannot order committal to prison.
- “ 27. Referee may submit any question to Judge before making his report, or state facts with power to Court to draw inferences.
- “ 28. Court have power to require explanations or reasons from Referee, and to remit cause to him for further consideration, &c.

### ORDER XXXII.

#### EVIDENCE—GENERALLY.

This is Barrister's business, but see the extent to which affidavit evidence is allowed.

### ORDER XXXIII.

#### COMMISSION TO EXAMINE WITNESS.

Present practice.

### ORDER XXXIV.

#### EVIDENCE BY AFFIDAVIT.

The substance of this Order is, that by consent a case may be determined by affidavit evidence ; and at the close of the evidence, motion may be made for judgment.

## ORDER XXXV.

## MOTION FOR NEW TRIAL IN JURY CASES.

This Order is Barrister's business.

## ORDER XXXVI.

## MOTIONS FOR JUDGMENT.

Rule—1. Except where otherwise provided by Rules, judgment of Court to be obtained on motion.

“ 2. When at or after trial by jury, the Judge has directed that any judgment be entered, any party may without leave reserved, apply to set aside such judgment, and enter any other judgment on ground that judgment is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to finding of jury upon the questions submitted to them.

“ 3. Item, upon the ground that upon finding of jury, the judgment directed is wrong.

(a) The application to set aside judgment under Rule 3, may be made to Divisional Court or Court of Appeal.

“ 4. Where issues have been ordered to be tried, or issues of fact to be determined in any manner, and there is no direction of Court or Judge for entry of judgment, case may be set down on motion for judgment as soon as issues disposed of.

“ 5. So as to some of several issues.

“ 6. Any application pending may be turned by order of Judge into a hearing.

## ORDER XXXVIII.

## EXECUTION.

There is nothing specially new in this Order except Rule 7, which provides that where the judgment is, that party is entitled to conditional relief, in order to get execution, he must demand the relief he is entitled to from the opposite party, and satisfy the Court that he has performed the condition.

## ORDER XXXIX.

## WRITS OF FIERI FACIAS.

Nothing new in this Order.

## ORDER XL.

## ATTACHMENT OF PERSON.

Nothing new in this Order.

## ORDER XLI.

## ATTACHMENTS OF DEBTS.

Nothing specially new in this Order. Garnishee practice as at present existing, re-affirmed, and made applicable to Equity as well as Common Law cases.

## ORDER XLII.

## WRIT OF POSSESSION OF LAND.

Rule—1. Judgment of possession to be enforced by writ of possession.

“ 2. Writ may issue on serving judgment and filing affidavit of such service, and that judgment has not been obeyed.

“ 3. Writ to have effect of writ of assistance as well as *Hab. fac. poss.*

## ORDER XLIII.

## WRIT OF DELIVERY (CHATTELS).

Writ for delivery of any property other than land or money, to be enforced as heretofore in actions of detinue.

## ORDER XLIV.

## CHANGE OF PARTIES BY DEATH.

Nothing new in this order. In effect the Chancery Practice as per Chancery Orders 337 to 351, adopted.

## ORDER XLV.

## TRANSFER AND CONDITION OF ACTIONS.

- Rule—1. Actions may be transferred from one Division of High Court to another by order of President of such Division.
- “ 2. Presidents of Queen’s Bench, Chancery, and Common Pleas Divisions, may periodically meet and assign to the respective Divisions an equal share of pending business.
- “ 3. In administration cases, the Judge of any Division may, by order, transfer to such Division of any action pending against the executors or administrator of testator or intestate.
- “ 4. Actions may be consolidated as heretofore.

## ORDER XLVI.

INTERLOCUTORY ORDERS AS TO MANDAMUS—INJUNCTION,  
OR INTERIM PRESERVATION OF PROPERTY.

- Rule—1. Where by any contract a *prima facie* case is established, and defendant in his defence claims to be wholly or partially relieved of liability, Court or Judge may make order for preservation or interim custody of subject matter of litigation, or order amount in dispute to be brought into Court, or secured.
- “ 2. Court or Judge may order sale of perishable goods.
- “ 3. Item \* \* \* for the detention, preservation or inspection of any property the subject of action, &c., also to authorize any samples to be taken, or any observation to be made, or experiment to be tried for the purpose of obtaining full information or evidence.
- 4 & 5. Directs when and how application to be made.
- “ 6. No writ of injunction to issue in any case. Injunction shall be by judgment or order which is to have effect of writ.

Rule—7. Where action brought to recover, or defendant by counter claim seeks to recover specific property other than land and lien claimed, *only*, he by either party, not disputing the other's title the Court or Judge may authorize the party to pay into Court or secure the amount for which lien claimed.

- “ 8. Where trusts of will or settlement are being administered and sale ordered of property vested in trustees, &c., or with power of sale, conduct of sale is give to trustees unless otherwise ordered.

The students will perceive that this order is an important one, affording means for preservation of property till right ascertained, giving power of inspection and experiment which in many cases may be very essential in order to the requisite proofs to make out case or defence; that *writs* of injunction are abolished and orders substituted.

## ORDER XLVII.

### MOTIONS AND OTHER APPLICATIONS.

The substance of this Order is, that the Chancery practice of proceedings by motion and notice of motion, except where motions are allowed to be *Ex parte* is to prevail. Proceedings by summons and rules *nisi* are abolished.

## ORDER XLVIII.

### APPLICATIONS AT CHAMBERS.

Applications at Chambers to be by motion or notice instead of summons.

## ORDER XLIX.

### OFFICERS AND OFFICES.

Treated of in beginning of Lectures.

## ORDER L.

## COSTS.

The Rules of this Order speak for themselves.

## ORDER LI.

Notices and affidavits may be partly in print and partly written.

## ORDER LII.

## TIME.

No remarks necessary, except perhaps as to Rule 2. It will be seen that the Rule excludes holidays as defined by the Interpretation Act in computation of any time limited for doing any act, although such holiday may be one of the intermediate and not the last day or first day.

## ORDER LIII.

## AFFIDAVIT.

How affidavits to be drawn up &c. No material alteration from present practice.

## ORDER LIV.

## DIVISIONAL AND OTHER COURTS.

Provides for what cases to be heard before Divisional Court, as distinguished from Judge of Divisional Court, viz :

Rule—1. Appeals from order in Chambers.

“ 2. Proceeding directed by Statute to be taken before any Court where decision of Court is final.

“ 3. Case of *habeas corpus* where Judge directs rule *nisi* for writ, or writ returnable in Court.

“ 4. When parties agree that Court can hear case.

“ 5. Application for new trials when trial has been by jury.

Bills of exceptions and proceedings in error are abolished.

## ORDERS LV.

## EFFECT OF NON-COMPLIANCE AND ERRORS.

Substance of this Order that errors are not to render proceedings void. Court or Judge may amend any defect or error.

## ORDER LVI.

## ACCOUNTANT'S OFFICE.

Suitor's accounts in Queen's Bench, Common Pleas and Chancery consolidated, and both kept by "Accountant of Superior Court." Directions as to cheques and moneys.

## ORDER LVII.

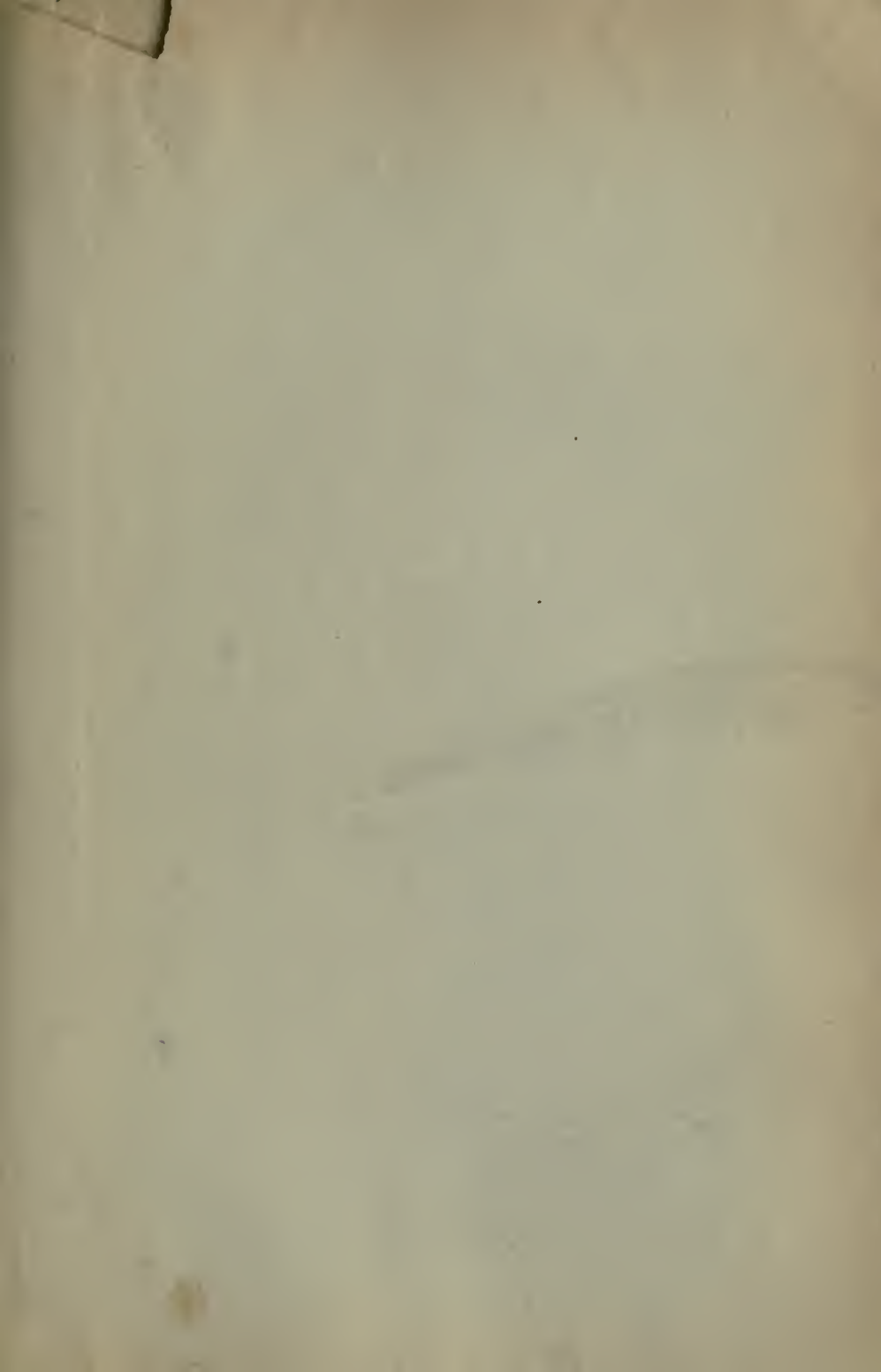
## SITTINGS AND VACATIONS.

Rule—1. Sittings of High Court to be three in each year, viz. :—1 Michaelmas Sittings ; 2. Hilary Sittings ; 3. Easter Sittings.

## ORDERS LVIII., LIX., LX., LXI., LXII.

These orders are short—adopting forms—regulating County Court Sittings, giving County Court jurisdiction as to costs, although no jurisdiction as to subject matter of suit. Interpretation and continuance of pending business.

In concluding these Lectures I take occasion to thank the Students for their attention. I have observed that they have taken a deep interest in my humble efforts to ameliorate, if possible, the tedium of dry reading by explanatory remarks. I wish you all may have a pleasant vacation, and come back to work and routine with renewed vigor and prepared to master all the details of an Act sufficiently copious to give you occupation for the remainder of your service, and it may be far beyond. I will report your attendance to Convocation. Your number affords some guarantee that if the Law School, which you have so much at heart, is re-established, it will not perish for want of suitors at the shrine of legal education.





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